

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiff,

V.

TRAVELERS INDEMNITY
COMPANY, et al.,

Defendants.

CASE NO. C14-1957 MJP

ORDER ON MOTION TO
BIFURCATE, STAY PROCEEDINGS
AND RESERVE COVERAGE
CLAIMS

The Court, having received and reviewed:

1. Plaintiff King County's Motion to Bifurcate, Stay Proceedings and Reservation of Coverage Claims (Dkt. No. 61);
2. Defendants' Joint Opposition to King County's Motion to Bifurcate, Stay Proceedings and Reservation of Coverage Claims (Dkt. No. 81);
3. Plaintiff King County's Reply in Support of King County's Motion to Bifurcate, Stay Proceedings and Reservation of Coverage Claims (Dkt. No. 89);

1 and all attached declarations and exhibits (and having heard oral argument), makes the following
 2 ruling:

3 IT IS ORDERED that the motion is DENIED.

4 **Background**

5 *Underlying Proceedings*

6 Plaintiff King County is involved in two pending underlying Superfund cleanup
 7 proceedings involving: (1) the Lower Duwamish Waterway Superfund Site (“LDW site”) and (2)
 8 the East Waterway Sediments operable unit of the Harbor Island Superfund Site (“Harbor Island
 9 site”). (Dkt. No. 13 at 4–8.) With respect to the LDW site, Plaintiff was named as a potentially
 10 responsible party (“PRP”) and a potentially liable party (“PLP”) by the Environmental Protection
 11 Agency (“EPA”) and Department of Ecology (“Ecology”) in 2000; it later negotiated a
 12 mediation process involving other PRP/PLPs to allocate liability for remedial action costs. (*Id.*
 13 at 5.) The mediation proceedings—which commenced in April 2014 and are still ongoing —
 14 seek to allocate liability for contaminating the LDW site among 45 parties total. (*Id.*) Plaintiff
 15 alleges it has incurred and continues to incur defense costs in response to these allocation
 16 proceedings. (*Id.* at 6.)

17 Regarding the Harbor Island site, Plaintiff was named as a PRP in 2006 and subsequently
 18 entered into a cost-sharing agreement with the Port of Seattle, which signed an Administrative
 19 Order on Consent with the EPA. (Dkt. No. 13 at 7.) Plaintiff alleges it has incurred and
 20 continues to incur defense costs in response to this proceeding. (*Id.* at 8.)

21 Plaintiff also seeks to recover defense costs for two other underlying suits that are now
 22 resolved. In *City of Seattle v. The Boeing Company*, an action involving the Slip 4 Early Action
 23 Area (“Slip 4”) of the LDW site, Plaintiff alleges it has resolved the claims of Boeing and the
 24

1 City of Seattle, but only partially resolved the claims of the EPA and Ecology. (Dkt. No. 13 at
 2 6.) In City of Seattle v. Malarkey Asphalt Company, an action involving the T-117 EAA of the
 3 LDW site, Plaintiff's complaint alleges it has resolved the claims of Malarkey and the Port of
 4 Seattle. (Id. at 7.)

5 Pending Bad Faith Litigation

6 Plaintiff filed its complaint on December 23, 2014, asserting a bad faith claim against
 7 Defendants Travelers Indemnity Company, et al., for failure to accept the tender of defense, to
 8 accept the tender of defense under a reservation of rights, and/or to timely defend Plaintiff in any
 9 one or all of the underlying actions discussed *supra*. (Dkt. No. 13 at 10.) Defendants
 10 counterclaimed for declaratory relief under their contracts, denying coverage and a duty to
 11 defend. (Dkt. Nos. 29, 45, 46.) Defendant Travelers filed a third party complaint against
 12 thirteen additional carriers. (Dkt. No. 46.)

13 Plaintiff now moves to bifurcate discovery and trial related to its bad faith claims from
 14 Defendants' coverage claims, cross-claims, third party claims, and coverage defenses on the
 15 grounds that Plaintiff's claim presents a separate, potentially dispositive preliminary issue, and
 16 that bifurcation would promote judicial economy and prevent prejudice. (Dkt. No. 61 at 7–13.)
 17 Plaintiff also requests that the Court stay all proceedings on Defendants' claims until Plaintiff's
 18 underlying litigation is resolved, and reserve Plaintiff's contractual coverage claims against
 19 Defendants. (Id. at 2–3.)

20 **Discussion**

21 I. Bifurcate Discovery and Trial

22 A. Legal Standard

23 Federal Rule 42(b) allows district courts to bifurcate claims based on judicial economy,
 24 prejudice, and convenience. The decision to bifurcate proceedings is within the sound discretion

1 of the district court. See Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998, 1021 (9th
2 Cir. 2004).

With respect to both discovery and trial, the moving party has the burden of proving that bifurcation will promote judicial economy, prevent prejudice to the parties, or avoid inconvenience. Spectra-Physics Lasers, Inc. v. Uniphase Corp., 144 F.R.D. 99, 101 (N.D. Cal. 1992). Bifurcation is inappropriate when the issues are so intertwined that separating them would create confusion to the trier of fact. Miller v. Fairchild Industries, Inc., 885 F.2d 498, 511 (9th Cir. 1989).

B. Dispositive Preliminary Issue

10 Plaintiff argues that bifurcation of discovery and trial is appropriate because resolution of
11 the bad faith claim in its favor will moot Defendants' counterclaims, third party claims, and
12 affirmative defenses. (Dkt. No. 61 at 7.) According to Plaintiff, its bad faith claim is distinct
13 from Defendants' coverage claims and factually limited to Defendants' failure to timely accept
14 tender of defense; it can therefore be resolved as a matter of law in summary judgment. (*Id.* at
15 11–12.) Having read the briefing on both sides and heard oral argument on this issue, the Court
16 is far from convinced that there are no disputed issues of material fact concerning the bad faith
17 claims and that this portion of this case will be resolved quickly on the legal merits alone.

18 Plaintiff's bad faith claim undoubtedly presents a separate legal issue from Defendants' 19 coverage claims and defenses. Nevertheless, the parties have raised multiple issues of material 20 fact, including whether: (1) Defendants reasonably responded to Plaintiff's tender letter (see Dkt. 21 No. 81 at 4–6; Dkt. No. 61 at 4–5; Dkt. No. 13 at 8–10), (2) Defendants agreed to timely 22 investigate Plaintiff's claims (see Dkt. No. 81 at 5; Dkt. No. 61 at 4–5; Dkt. No. 13 at 10), and 23 (3) Plaintiff provided adequate information to Defendants to investigate and defend Plaintiff's

1 claims (see Dkt. No. 81 at 5, 7; Dkt. No. 90 at 1, 15–20). Thus, it is doubtful that this Court can
2 find—as a matter of law—that Defendants failed to investigate or defend Plaintiff’s underlying
3 claims in good faith and thereby dispose of Defendants’ coverage claims by estopping their
4 denial of coverage. Defendants allege that their claims are fact intensive and will require
5 extensive written and deposition discovery, motion practice, expert testimony, and trial (Dkt. No.
6 81 at 13); the Court is inclined to agree.

7 Thus, even if this claim were ultimately resolved in Plaintiff's favor, it is questionable if
8 bifurcating it will promote judicial economy. Additionally, the Court has other concerns
9 regarding the likelihood of cost and time savings to either the Court or the parties.

C. Judicial Economy

11 Plaintiff argues that bifurcating discovery and trial will promote judicial economy
12 because Plaintiff's bad faith claim presents a separate, potentially dispositive preliminary issue.
13 (Dkt. No. 61 at 7.)

14 This Court has previously denied the bifurcation of bad faith claims and contractual
15 coverage claims on judicial economy grounds. See Van Wijk v. Western Nat. Assur. Co., 2011
16 WL 1771878, at *1 (W.D. Wash. 2011)(“It would be . . . time-consuming for the Court if two
17 separate discovery periods and trials were required on intertwined factual issues.”)

18 The Court finds that, in this case, bifurcating discovery and (most likely) trial on the bad
19 faith claim alone will not promote judicial economy. If Plaintiff does not prevail on its bad faith
20 claim, bifurcation will result in two separate trials and added costs to the Court in jurors, court
21 time, and personnel; and to the parties in pretrial discovery, motion practice and litigation.

22 Further, the Court questions whether it is even feasible to separate bad faith discovery
23 from coverage discovery. (See Dkt. No. 81 at 13.) Defendants presented multiple examples of

1 overlap between the discovery Defendants will seek to conduct and the discovery Plaintiff wants
 2 stayed. (See id. at 9–10 n.5.) While bad faith and coverage claims constitute two separate legal
 3 issues, such cases often present intertwined factual issues. See Van Wijk, 2011 WL 1771878, at
 4 *1.

5 At the very least, even if the claims were bifurcated, the Court can easily foresee a
 6 lengthy cycle of discovery disputes as the parties contest which evidence sought by Defendants
 7 is applicable to which claims, further undercutting Plaintiff’s “judicial economy” argument.
 8 Plaintiff argues that the facts and legal arguments concerning the bad faith and coverage claims
 9 are unrelated, but the Court agrees with Defendants: if that were the case, why is Plaintiff
 10 attempting to reserve the coverage claims for a later proceeding? It does not appear that judicial
 11 economy would be served by granting Plaintiff’s motion.

12 D. Prejudice

13 Plaintiff also argues that litigating contractual coverage issues now will prejudice its
 14 defense of the underlying claims because the facts relevant to both suits are substantially similar.
 15 (Dkt. No. 61 at 9–10.) The overlapping factual issues include Plaintiff’s culpability with respect
 16 to the contamination, its ownership of the contaminated facility, and its undue delay in tendering
 17 defense. (Id. at 10–11.) According to Plaintiff, the risk of prejudice will force Plaintiff to risk its
 18 defenses to the underlying suits or abandon its bad faith claim unless bifurcation is granted. (Id.
 19 at 10.)

20 A number of factors mitigate against Plaintiff’s position concerning prejudice. First, the
 21 Court is reluctant to rule that Plaintiff may pursue a claim against its insurers while denying
 22 those defendants the discovery which may be required to adequately defend themselves. This is
 23 not a case where the insurance companies brought suit against their insured for a declaratory
 24

1 judgment, thus forcing their client's hand while underlying litigation was ongoing. Plaintiff, the
 2 insured, chose to file its claims at this juncture, and the Court is hard-pressed to believe that King
 3 County did not know that in so doing it would force its insurance companies to seek discovery
 4 on the very issues it is now attempting to foreclose through this motion.

5 Second, Plaintiff has failed to provide the level of evidentiary and procedural detail
 6 regarding the underlying litigation which might persuade this Court of its position. The
 7 Malarkey and Boeing cases have already been settled, so failing to bifurcate as to those cases
 8 could not create active interference in an ongoing proceeding. As for the remaining underlying
 9 matters, Plaintiff has simply not supplied the Court with enough information regarding the status
 10 of those proceedings (e.g., whether discovery is ongoing or concluded) to carry its burden of
 11 demonstrating that the requisite prejudice would result from moving forward with both the bad
 12 faith and coverage claims in this litigation.

13 Finally, Plaintiff has failed to show in what fashion it would be prejudiced by possibly
 14 being required to produce evidence in this litigation that is relevant to the issues in its underlying
 15 actions. King County does not establish (if it is indeed the case) that providing discovery to
 16 Defendants in this case would force it to take positions inconsistent with its position in the
 17 allocation proceedings. Nor does Plaintiff allege that the parties in the underlying proceedings
 18 lack either knowledge of or access to any information that Defendants might request in discovery
 19 here. Indeed, it appears that the enforcement actions which Plaintiff seeks to preserve
 20 unprejudiced have been ongoing for over a year; it strains credulity to imagine that, in that period
 21 of time, the army of attorneys representing (by Plaintiff's account) 45 parties has not sought out
 22 every shred of evidence that Defendants could possibly seek in this lawsuit. At the very least,

23

24

1 Plaintiff has presented no evidence which would tend to establish that fact. King County has not
 2 satisfied its burden of proof on the issue of prejudice.

3

4 II. Stay of Proceedings

5 Plaintiff also moves to stay all proceedings on Defendants' counterclaims and third party
 6 claims until the underlying proceedings for environmental cleanup against Plaintiff is resolved.
 7 (Dkt. 61 at 2.)

8 A district court has the inherent power to stay its proceedings. This power to stay is
 9 "incidental to the power inherent in every court to control the disposition of the causes on its
 10 docket with economy of time and effort for itself, for counsel, and for litigants. Landis v. North
 11 American Co., 299 U.S. 248, 254 (1936). When considering a motion to stay, the court weighs a
 12 series of competing interests: (1) the possible damage that may result from the granting of the
 13 stay, (2) the hardship or inequity which a party may suffer in being required to go forward, and
 14 (3) the orderly course of justice measured in terms of the simplifying or complicating of issues,
 15 proof, and (4) questions of law which could be expected to result from a stay. CMAX, Inc. v.
 16 Hall, 300 F.2d 265, 268 (9th Cir. 1962).

17 As discussed *supra*, Plaintiff has not made the required showing that it will suffer
 18 hardship in the underlying proceedings if the stay is denied. In view of the seemingly
 19 intertwined nature of the facts as regards the bad faith and coverage claims, it cannot be said that
 20 the complications which would arise from attempting to sort out "stayed" from "unstayed"
 21 discovery issues would in any manner promote "the orderly course of justice." See Cook v.
 22 United Auto. Ass'n., 169 F.R.D 359, 362 (D. Nev. 1996); and Van Wijk, 2011 WL 1771878, at

23

24

1 *1. The Court will not stay the proceedings on Defendants' counterclaims and third party
 2 claims pending conclusion of the underlying environmental proceedings.

3

4 III. Reservation of Plaintiff's Coverage Claims

5 Plaintiff requests the Court expressly order that Plaintiff may reserve its potential
 6 coverage claims in order to remove the potential for a claim splitting dispute in future coverage
 7 litigation. (Dkt. No. 61 at 13.) At the outset, the Court believes that the rulings on the requests
 8 for bifurcation and a stay tend to obviate the need to reserve any claims Plaintiff may have in this
 9 litigation.

10 But, more to the point, Plaintiff has failed to establish that the federal rules of civil
 11 procedure even support such a request. In its briefing, Plaintiff cited a state court case which
 12 approved of the practice (Cummings v. Guardianship Svcs., 128 Wn.App. 742 (2005)) and a
 13 federal court case which merely acknowledged that a reservation of claims had occurred in an
 14 underlying state court proceeding (Dodd v. Hood River Cty., 59 F.3d 852 (9th Cir. 1995)). But
 15 Plaintiff is in federal court pursuing federal claims and federal procedural rules apply.

16 Pressed at oral argument to provide support for this procedure at the federal court level,
 17 Plaintiff offered up Venuto v. Witco Corp., 117 F.3d 754 (3rd Cir. 1997). The case does nothing
 18 to support Plaintiff's position. While the appellate court ruled that a claim had in fact been
 19 preserved for a second legal action, the ruling was based on its finding that the district court
 20 judge "might have 'intended to permit the second action in light of the defendant's apparent
 21 support of a second action,' thus apparently preserving [Plaintiff's] claims for purposes of the
 22 entire controversy doctrine." Id. at 757-58. No such agreement exists in this case between the

23

24

1 parties and, in light of the rejection of the bifurcation and stay requests, the Court sees no utility
2 or necessity in reserving any of Plaintiff's claims in this matter.

3

4 **Conclusion**

5 Plaintiff has failed to demonstrate that bifurcation will promote judicial economy or is the
6 only means to avoid prejudice to its positions in the underlying proceedings, and its motion to
7 bifurcate is DENIED. Having reached that conclusion, the Court sees no need to stay any
8 portion of this matter, or to permit Plaintiff to reserve any claims it may have for later
9 adjudication; accordingly, those motions are DENIED as well.

10

11 The clerk is ordered to provide copies of this order to all counsel.

12

Dated August 14, 2015.

13

14



15 Marsha J. Pechman
16 United States District Judge

17

18

19

20

21

22

23

24